*UNITED STATES DISTRICT COURT*

*DISTRICT OF MAINE*

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| ***RODNEY BONSALL, et al.,*** | ***)*** | |
| | ***)*** | |
| ***Plaintiffs*** | ***)*** | |
| | ***)*** | |
| ***v.*** | ***)*** | |
| | ***)*** | |
| ***MANUFACTURERS SUPPLIES COMPANY,*** | ***)*** | |
| | ***)*** | ***Civil No. 94-60-P-H*** |
| ***Defendant/Third-Party Plaintiff*** | ***)*** | |
| | ***)*** | |
| ***v.*** | ***)*** | |
| | ***)*** | |
| ***W.S. BESSETT, INC.,*** | ***)*** | |
| | ***)*** | |
| ***Third-Party Defendant*** | ***)*** | |

***RECOMMENDED DECISION ON***
***THIRD-PARTY DEFENDANT'S MOTIONS TO DISMISS***
***AND FOR SUMMARY JUDGMENT***

This is a diversity action stemming from a workplace injury suffered by plaintiff Rodney Bonsall. In the complaint it is alleged that Bonsall's injuries were caused by the defective design of a leather strip-cutting machine sold to his employer by the defendant, Manufacturers Supplies Company (``MSC''). MSC, in turn, has impleaded third-party defendant W.S. Bessett, Inc. (``Bessett''), seeking contribution and indemnification and alleging that the injuries to Bonsall were the result of certain modifications to the strip-cutting machine made by Bessett. Pending before the court are Bessett's motions to dismiss and for summary judgment. I recommend that the court grant the summary judgment motion.

## I. Summary Judgment Standards

Summary judgment is appropriate only if ``the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed R. Civ. P. 56(c). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining if this burden is met, the court must view the record in the light most favorable to the nonmoving party and ``give that party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990) (citation omitted). ``Once the movant has presented probative evidence establishing its entitlement to judgment, the party opposing the motion must set forth specific facts demonstrating that there is a material and genuine issue for trial." *Id*. at 73 (citations omitted); Fed. R. Civ. P. 56(e); Local Rule 19(b)(2). A fact is ``material" if it may affect the outcome of the case; a dispute is ``genuine" only if trial is necessary to resolve evidentiary disagreement. *Ortega-Rosario*, 917 F.2d at 73.

## II. Factual Context

Viewing the relevant facts in the light most favorable to MSC as the non-moving party, the record reveals the following. On June 19, 1992 Bonsall was employed as a machine operator at the Cole-Haan factory in Sanford, and while operating a leather strip-cutting machine on that date he sustained injuries to one of his hands when it was pulled into the machine. Affidavit of Patrick Flood (``Flood Affidavit") (Docket No. 22) at & 1; Deposition of Rodney Bonsall (``Bonsall Deposition"), Exh. 1 to Statement of Undisputed Material Facts Submitted on Behalf of Third-Party

Defendant W.S. Bessett, Inc. (``Third-Party Defendant's Statement of Material Facts")(Docket No. 21), at 13; Deposition of Cole-Haan Accessories Company by Curtis E. Ham (``Ham Deposition"),[1] Exh. 2 to Third-Party Defendant's Statement of Material Facts, at 30. Cole-Haan purchased the strip cutter from MSC. Complaint & 5; Answer & 5.

[1] Other portions of the Ham Deposition are attached to the Affidavit of Laura J. Krims (``Krims Affidavit") (Docket No. 30). Counsel are reminded that Local Rule 18(f) requires the filing of *complete* copies of deposition transcripts, and not selected portions as was done here.

The moving parts of the strip cutter include a rotating horizontal steel bar, on which are located circular blades that cut pieces of leather into appropriately-sized strips for making belts. Bonsall Deposition at 14-15; Affidavit of Alan Hooper (``Hooper Affidavit") (Docket No. 23) at & 2. Beneath the steel bar is a bottom roller; the bar and the bottom roller rotate toward one another and pull the leather pieces through the blades for cutting. *Id*. The rotating blades are shielded by a clear plastic guard (hereinafter, the ``guard"). See Exh. 1 to Affidavit of Frederick C. Moore (``Moore Affidavit") (Docket No. 25). As the machine was supplied to Cole-Haan by MSC, the guard could be raised or lowered. Ham Deposition at 132. When the guard was in its lowest position, it rested atop a device supplied by MSC for the purpose of guiding the leather into the machine properly. *Id.* at 11, 25. This device is referred to throughout the record as the ``original guide." Although a ``micro-switch" would cut off power to the strip cutter if the guard were removed altogether, it was possible to operate the strip cutter with the guard in a raised position such that the operator could reach into the machine and use pliers to disentangle a piece of leather from the cutting blades and other moving parts.[2] Ham Deposition at 154-55; Bonsall Deposition at 83-84.

After acquiring the machine from MSC, Cole-Haan discovered that the quality of the work performed by the strip cutter was sometimes unsatisfactory because the leather was not being guided into the machine properly. Hooper Affidavit at & 3; Ham Deposition at 169, 210; Bonsall

[2] MSC contends that there is a genuine issue of material fact with respect to this assertion. *See* First Statement of Controverted Facts Submitted by the Defendant (Docket No. 31) at & 11. To rebut the assertion that the strip cutter could be operated with the guide raised high enough to permit the operator's hands to reach the moving parts, MSC relies on two letters from its engineering expert, John W. Mroszczyk. They are attached as unnumbered exhibits to the Krims Affidavit. Neither Mroszczyk letter meets the formal requirements of Fed. R. Civ. P. 56(e), requiring sworn factual statements made on personal knowledge. *See* C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* ' 2722 (1983) at 60 (noting that a letter submitted for consideration under Rule 56(e) must be authenticated by its author). Therefore, I do not credit them.

Deposition at 29. Consequently, Cole-Haan commissioned Bessett to design and build a new guide (hereinafter, the ``Bessett guide") for the strip-cutting machine.[3] Ham Deposition 76-77. Installed on the strip cutter, the Bessett guide was somewhat larger than the original guide. Ham Deposition at 23-25.

At the time of the accident, Bonsall was operating the strip cutting machine by using the original guide and not the Bessett guide. Bonsall Deposition at 28-29; Ham Deposition at 30. Bonsall's hand was resting on the top of the original guide when it was pulled into the machine. Ham Deposition at 146.

[3] This is a disputed fact. Bessett asserts that it was Cole-Haan's plant manager who designed the new guide, and that Bessett simply built it according to the drawings and specifications submitted by Cole-Haan. *See* Hooper Affidavit at && 4-7; Affidavit of Michael Waitt (``Waitt Affidavit") (Docket No. 24) at && 5-8.

## III. Discussion

Bessett contends that it is entitled to summary judgment because there is no evidence that the Bessett guide caused the accident that injured Bonsall, or that Bessett violated any duty of care. The Law Court has recently summarized the standard for products liability in Maine as follows:

> Strict products liability attaches to a manufacturer when by a defect in design or manufacture, or by the failure to provide adequate warnings about its hazards, a product is sold in a condition unreasonably dangerous to the user. Products liability sounds in negligence when by its design or failure to warn, the defendant breaches a duty owed to the plaintiff, and such breach was the actual and legal cause of the plaintiff's injuries.

*Pottle v. Up-Right, Inc*., 628 A.2d 672, 674-75 (Me. 1993) (citations omitted); *see also Walker v. General Elec. Co*., 968 F.2d 116, 119 (1st Cir. 1992).

> [T]he general rule [is] that the supplier of a product is liable to expected users for harm that results from foreseeable uses of the product if the supplier has reason to know that the product is dangerous and fails to exercise reasonable care to so inform the user.

*Pottle*, 628 A.2d at 675 (quotation marks and citations omitted).[4] It is uncontested that the Bessett guide was not in use at the time of the accident, and there is therefore no suggestion that any defect in the Bessett guide itself was the cause of Bonsall's injuries. Nor has MSC come forward with

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[4] In Maine, the cause of action for strict liability is defined by statute as follows:

> One who sells any goods or products in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to a person whom the manufacturer, seller or supplier might reasonably have expected to use, consume or be affected by the goods, or to his property, if the seller is engaged in the business of selling such a product and it is expected to and does reach the user or consumer without significant change in the condition in which it is sold. This section applies although the seller has exercised all possible care in the preparation and sale of his product and the user or consumer has not bought the product from or entered into any contractual relation with the seller.

14 M.R.S.A. ' 221.

admissible evidence to rebut Bessett's contention, supported by specific references to the record, that the Bessett guide was not even present on the strip cutting machine at the time Bonsall suffered his injury.[5] However, MSC also bases its theory of Bessett's liability on a contention that Bessett knew

[5] In support of its contention that there is a genuine issue of material fact on this point, MSC relies on the statements made by Bonsall in his deposition. He first testified that both the Bessett guide and the original guide were on the strip cutting machine when the accident took place. Bonsall Deposition at 27. But he later testified that he could not ``say with 100 percent certainty'' that the Bessett guide had not been removed. *Id*. at 96. Shown the police photo taken of the strip cutter following the accident, Bonsall testified that the photograph ``challenges [his] memory.'' *Id*. at 97. Asked whether he would have reason to disagree if the plant manager were to testify that the Bessett guide had been removed prior to the accident, Bonsall testified: ``I don't know one way or another. I guess, I don't recall. No I wouldn't have -- I couldn't verify it but I don't dispute it either. I don't know.'' *Id*. at 98. Thus, Bonsall can be understood to have withdrawn his previous assertion that both guides were present.

MSC also relies on the Affidavit of Pat Grady (``Grady Affidavit''), which appears as an unnumbered exhibit to the Krims Affidavit. Grady states that on the date of the accident, he was ``called to the Cole-Haan factory'' by plant manager Hooper, that he arrived at the factory ``very shortly after the accident,'' and that Hooper ``stated that the Bessett guide was on the machine at the time that Rodney Bonsall hurt his hand, and that the barrier was raised to a higher position to accommodate the Bessett guide.'' Grady Affidavit at & & 1-2. According to Grady, Hooper was ``very upset'' at the time he made these disclosures to Grady. *Id*. at & 3. MSC contends that these assertions, although hearsay, would be admissible as evidence at trial, either as a present sense impression or as an excited utterance. *See* Fed. R. Evid. 803(1) and (2). The former requires that the statement be made ``while the declarant was perceiving the event or condition, or immediately thereafter.'' *Id*. at (1). The latter is a ``statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.''

Bessett has filed a motion to strike the Grady Affidavit from the record, *see* Docket No. 37, pointing out that it is not really an affidavit but an unsworn signed statement, that some of the assertions contained therein are not based on personal knowledge, and that the document therefore falls short of the requirements set forth in Rule 56(e). I agree, and further note that the undated document does not even contain an original signature. For these reasons, I grant MSC's motion to strike the Grady Affidavit.

Moreover, even if the Grady Affidavit were to remain in the record, it would not be sufficient to establish a genuine issue of material fact as to the presence of the Bessett guide on the strip cutting machine at the time of the accident. A party opposing a summary judgment motion may not automatically rely on these hearsay exceptions to make factual assertions in an affidavit ``admissible in evidence'' as required by Rule 56(e); the court must make a determination based on the specific circumstances as to whether there is enough ``unreflective spontaneity . . . to supply the internal

or should have known that use of the Bessett guide would require modification of the clear plastic guard on the strip cutting machine in a manner that would leave the machine's operator vulnerable to the kind of injury suffered by Bonsall. *See* Objection of the Defendant, Manufacturers Supplies Company, to Third-Party Defendant's Motion for Summary Judgment, with Incorporated Memorandum of Law (Docket No. 29) at 7-10.

Relying on the affidavit of its vice president, Bessett contends that it had no knowledge as to the manner in which the Bessett guide would be installed on the strip cutter. Waitt Affidavit && 5-8. In fact, this affidavit avers that Bessett simply fabricated its guide according to specifications provided by Cole-Haan. *Id*. MSC relies on the deposition testimony of a Cole-Haan supervisor to assert that at least one official of Bessett visited the factory prior to making the guide, and that the Bessett official used the visit to take measurements and ask questions about the guide's potential usage. Ham Deposition at 76-77. Assuming for purposes of the summary judgment motion that at least one Bessett official made such a visit, the record still lacks anything to suggest that anyone at Bessett knew that installation and use of its guide would require modification of the strip cutter's shield in a manner that would render the strip cutter unreasonably dangerous to the user. Therefore,

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trustworthiness that cross-examination is not available to test." *Sakaria v. Trans World Airlines*, 8 F.3d 164, 171-72 (4th Cir. 1993), *cert. denied*, 128 L. Ed. 2d 463 (1994). The affidavit gives the court no information as to the reason Grady was called to the plant following the accident, nor any other information that would give the court a basis for evaluating the reliability of his contentions. In the circumstances, Grady's naked assertion that he heard Hooper's statements ``very shortly'' after the accident is too vague to permit the court to conclude, based on the Grady Affidavit, that these statements would be admissible as exceptions to the hearsay rule.

to the extent that MSC's theory of liability depends on the contention that Bessett had actual knowledge that using the Bessett guide would require dangerous modification of the strip cutting machine, Bessett is entitled to prevail at the summary judgment stage. *See Thomas v. Metropolitan Life Ins. Co.*, 1994 WL 656880 (1st Cir., Nov. 28, 1994) *3 (``Mere allegations, or conjecture unsupported in the record, are insufficient to raise a genuine issue of material fact."); *Smith v. Stratus Computer, Inc.*, 1994 WL 645986 (1st Cir., Nov. 22, 1994) *1 (when non-moving party has burden of proof at trial and fails to make a showing at summary judgment stage as to the existence of a critical element, moving party entitled to summary judgment); *Woods v. Friction Materials, Inc.*, 30 F.3d 255, 259 (1st Cir. 1994) (non-moving party may not rely on unsupported speculation).

MSC further contends that even if Bessett did not have actual knowledge that the strip cutter would be operated in an unreasonably dangerous manner as a result of the Bessett guide, then Bessett is still liable because it should have had such knowledge. In support of this contention, MSC offers the following views of its expert witness:

> W.S. Bessett has a duty to design guides which are compatible with the machine.
>
> If a guide could not fit within the available opening then the scope of work should have also included the necessary modifications to the barrier so that the operator would be protected. W.S. Bessett failed in this duty because the guides they designed and manufactured could not be used without modifying the barrier. It is the subsequent modifications to the barrier which left the operator unprotected, whether a Bessett guide was actually on the machine at the time of the incident or not.

Letter from John W. Mroszczyk dated Nov. 23, 1994, appended to Krims Affidavit. Even if the Mroszczyk letter were properly authenticated, *see* note 2, *supra*, his assertion is insufficient to resist Bessett's summary judgment motion. ``[I]n order to defeat a motion for summary judgment an expert opinion must be more than a conclusory assertion about ultimate legal issues." *Hayes v. Douglas Dynamics, Inc.*, 8 F.3d 88, 92 (1st Cir. 1993). Other than the views of its expert, MSC cites no

authority for the proposition that Bessett owed to potential users of the machine a duty to assure the safety of any modifications to the strip cutter as a result of the installation of the Bessett guide. *Pottle* makes clear that in Maine products liability based on a failure to provide adequate warnings of the product's hazards depends on a finding of harm resulting from foreseeable uses of the product. *Pottle*, 628 A.2d at 675. This foreseeability requirement exists whether the claim sounds in negligence or strict liability. *Id*. Since the product supplied by Bessett was not the strip cutter or the guard attached to it, but the guide manufactured by Bessett, Bessett is only liable if the unsafe use of the *guide* was foreseeable. Given the record in this case, to assume such foreseeability would be to indulge in the kind of speculation that, as the First Circuit Court of Appeals has recently reaffirmed in *Thomas, Smith, Woods* and *Hayes*, is inappropriate even when viewing the facts in the light most favorable to a party resisting a summary judgment motion. MSC has failed to adduce any competent evidence from which the court could conclude that the Bessett guide was even an indirect cause, through modification of the strip cutter, of the injuries to the plaintiff. Nor has it demonstrated that, as a matter of law, Bessett had a duty to warn Cole-Haan or its employees that the guide manufactured by Bessett was dangerous.

## IV. Conclusion

For the foregoing reasons, I recommend that Bessett's summary judgment motion be **GRANTED**.[6]

***NOTICE***

[6] Of course, if this proposed disposition is adopted, no action would be required concerning Bessett's motion to dismiss.

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

*Dated at Portland, Maine this 7th day of December, 1994.*

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*David M. Cohen*
*United States Magistrate Judge*